Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 88-2035

In The Supreme Court of the United States

October Term, 1989

ADAMS FRUIT COMPANY, INC.,

Petitioner,

v.

RAMSFORD BARRETT, et al,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF ADAMS FRUIT COMPANY, INC.

John I. Haas, Inc. ("Haas") moves the court for leave to file an amicus curiae brief in support of Adams Fruit Company, Inc. ("Adams Fruit").

Written consent of Adams Fruit to Haas to file an amicus curiae brief has been received and separately filed with this court. Oral consent of the trial counsel of Barrett et al has been given. Written consent has been requested, but not yet received.

John I. Haas, Inc. ("Haas") is an agricultural employer and the defendant in the pending case, *Fletes v. John I. Haas, Inc.*, Case no. 89-85FR (D Or 1989). Fletes alleges in her suit that she is entitled to damages under the Migrant and Seasonal Agricultural Workers Protection Act ("AWPA"), 29 USC § 1801 et seq. Haas moved for summary judgment on the ground that the Oregon Workers' Compensation Law, ORS 656.001 et seq, provides Fletes's exclusive remedy against her employer, Haas. The District Court denied Haas's motion for summary judgment, citing *Barrett v. Adams Fruit Co., Inc.*, 867 F2d 1305 (11th Cir 1989) and quoting the Eleventh Circuit's language in that opinion that the exclusive remedy provision of the Florida Workers' Compensation Act is preempted by AWPA. In reaching its decision, the district court, like the Eleventh Circuit in *Barrett*, found that the possibility of double recovery may be considered in awarding actual damages. The decision of this Court will likely be dispositive of an appeal by Haas resulting from the District Court's denial of Haas's motion for summary judgment.

Haas is in a position to view the issue presented to this Court by Adams Fruit from a different perspective than that of Adams Fruit because in *Fletes* it is unlikely that there will

be a final decision whether the worker is entitled to receive state workers' compensation benefits at the time the AWPA action is tried. Haas's amicus brief explains that in many circumstances it is impossible to determine at the time the AWPA action is tried whether and what benefits will be received by the worker under state workers' compensation acts. As a result, if the exclusive remedy provisions of state workers' compensation acts are held to have been preempted, workers can receive a double recovery from the employer and its insurer. This is a result that Congress could not have intended.

Respectfully submitted,

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November 16, 1989

INTEREST OF AMICUS CURIAE

John I. Haas, Inc. ("Haas") is an agricultural employer, who submits this brief as amicus curiae in support of Adams Fruit Company, Inc. ("Adams Fruit").

SUMMARY OF ARGUMENT

The offset proposed by the Eleventh Circuit to damages awards is often impossible to calculate. As a result, if the Migrant and Seasonal Agricultural Workers Protection Act is held to have preempted the exclusive remedy provisions of state workers' compensation acts, employers will often have to pay injured workers twice for injuries. Congress could not have intended this result.

ARGUMENT

The Eleventh Circuit in *Barrett v. Adams Fruit Co., Inc.*, 867 F2d 1305, 1310-1311 (11th Cir 1989) concluded that a court can consider "the amount of workers' compensation benefits received" in calculating the amount of actual damages to be awarded under the Migrant and Seasonal Agricultural Workers Protection Act, 29 USC § 1801 et seq ("AWPA"). As a result, the Eleventh Circuit seems to have concluded that the apparent congressional intent that there not be double recovery by a worker would not be violated if section 1854 of the AWPA was held to preempt the exclusive remedies provision of Florida's workers' compensation laws, Fla Stat Ann § 440.11 (West 1981). 867 F2d at 1310-1311. The District of Oregon in its opinion denying defendant's motion for summary judgment in *Fletes v. John I. Haas, Inc.*, Case No. 89-85FR (D Or 1989), quoted this ruling of *Barrett* and came to the similar conclusion that "[t]he possibility of a double recovery may be considered in awarding actual damages." *Fletes v. John I. Haas, Inc.*, Case No. 89-85FR (D Or June 2, 1989), reprinted in Adams Fruit Company, Inc.'s Petition for Writ of Certiorari as Appendix I, at p. 45a.

These courts are correct that double recovery should not be allowed. Congress could not have intended and apparently did not intend that employers should pay a worker twice for his or her injuries. HR Rep No. 97-885, 97th Cong, 2d Sess, reprinted in 1982 US Code Cong & Admin News 4566 (where agricultural workers are transported and are covered by state workers compensation, "no additional insurance for damages to persons need be obtained"). However, preemption will often create double recovery.

Double recovery can occur in a number of ways. First, in many instances the right to workers' compensation benefits will not be determined until well after there is a final

judgment in the AWPA action. *Fletes*, currently pending in Oregon federal district court, illustrates this problem. Fletes filed for workers' compensation benefits, but the benefits were denied by Haas's insurer on the grounds that the alleged injuries did not arise out of or within the course of her employment. Pursuant to ORS 656.319, Fletes then requested and received a hearing before a referee of the Oregon Workers' Compensation Board. Following a hearing in which witnesses were called, the referee upheld the denial of workers' compensation benefits.

Pursuant to ORS 656.295, Fletes then appealed the referee's decision to the Oregon Workers' Compensation Board. That appeal has been pending since October 1987. If Fletes or, for that matter, Haas is unhappy with the Board's decision, either may yet appeal to the Oregon Court of Appeals pursuant to ORS 656.298, then seek review by the Oregon Supreme Court, and ultimately petition for a writ of certiorari from this Court. Until the review and appellate process initiated by Fletes on her right to workers' compensation benefits is concluded, and this process may still be long from over, there is no way to know if compensation benefits will ultimately be awarded to Fletes.

In contrast, her pending AWPA action in Oregon federal court could be tried within the next several months. (Indeed, many civil cases in the Oregon federal district court are tried within one year of the date of filing of the complaint.) If Fletes prevails in the AWPA action, at the time the Oregon federal court enters judgment it will thus not know whether plaintiff will ever be awarded compensation under Oregon Workers' Compensation Act. The court will therefore have no way to decide whether to allow for an offset to avoid double recovery, let alone in what amount.

Even if an employer or its compensation insurer has accepted the injury claim under a state workers' compensation system before a federal district court awards actual

damages under the AWPA, the problem is not solved because the Eleventh Circuit's conclusion in *Barrett* that there can be an offset for "the amount of workers' compensation benefits received," 867 F2d at 1311, ignores the nature of workers' compensation benefits. To start with, benefits are often not "received" in a single lump sum. Rather, many, and in particular cases most, benefits are received in the future. Apart from that, in many instances it can be impossible to predict with any degree of reasonable certainty the present value of benefits yet to be received.

Under Oregon Workers' Compensation Law, ORS 656.001 et seq, for example, if the claim is accepted, the worker still may not be medically stationary at the time of the AWPA award. If the worker is not medically stationary, his or her right to permanent total disability, ORS 656.206, permanent partial disability, ORS 656.214, temporary total disability, ORS 656.212, or temporary partial disability, ORS 656.210, is unknown. Depending on which of these four classifications the worker's injuries fall into, he or she may receive different kinds or schedules of benefits. Compare, ORS 656.206, 656.210, 656.212, and 656.214.

Further, under ORS 656.273 a worker is entitled to additional compensation for unforeseeable but worsened conditions resulting from the original compensable injury. These "aggravation" rights extend for five years from any of three different dates. ORS 656.273(4). Yet it is essentially impossible in many instances to predict whether a particular worker will sustain one or more aggravations during the five-year aggravation period. In addition, the Oregon Workers' Compensation Board can modify, change, or even terminate awards and findings over the life of the worker. ORS 656.278. The Board can also suspend benefits for a period of time. ORS 656.325. Thus, even when the right to workers' compensation benefits has been decided before

the offset must be calculated, calculation of future benefits can be little more than a stab in the dark.

The Eleventh Circuit's rule in *Barrett* can also lead to a tactical manipulation of the courts and the workers' compensation system. As explained above, the worker can obtain double recovery from the employer if his or her compensation claim is decided after the AWPA action. The worker thus has the incentive to delay making his or her compensation claim and to string out the determination of benefits under the workers' compensation system, by appeals or otherwise, as long as possible.

One approach in response to these problems is for the federal courts to recognize that, as a matter of federal law, the AWPA creates by implication for employers a right of action against an employee for reimbursement if subsequent to the AWPA decision the employee receives either the right to obtain workers' compensation benefits or there is an increase in his or her compensation benefits through modification of an earlier award. It seems unlikely, however, that Congress intended to create such a federal right at essentially the same time it restricted diversity jurisdiction and declined to increase the size of the federal bench as rapidly as many have urged. But if it is held that the AWPA preempts the exclusive remedies provisions, the recognition of such a right of action is a necessary conclusion.

Nor does state law provide any promise of relief to employers who are faced with the prospect of double payments. For example, in roughly analogous circumstances Oregon law bars actions by an automobile insurer which seek to recover through reimbursement from or impose a trust on funds that a workers' compensation insurer is obligated to pay to a worker for the same injuries that the automobile insurer has previously provided benefits. *Farmers Insurance Co. v. Ownby*, 40 Or App 15, 594 P2d 834 (1979). Even were there a right of

action, Oregon law would bar garnishment of workers' compensation benefits. ORS 656.234.

Finally, permitting recovery under both the AWPA and the state workers' compensation acts wrongly increases the litigation burden of the employers. In many instances, and in Fletes in particular, the employer can be forced to simultaneously defend claims for damages for the same injuries in the workers' compensation system and the courts. Congress could have not meant that result, nor should this Court endorse that result.

CONCLUSION

The Eleventh Circuit incorrectly concluded that an offset can be calculated so that employers and their insurers, when they are insured, will not have to pay a employee twice for his or her injuries. It therefore also incorrectly concluded that the exclusive remedy provisions of state workers' compensation acts are preempted by the AWPA.

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